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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SINCLAIR OIL CORPORATION,
a Wyoming corporation,
Petitioner,

vs.

COUNTY OF SANTA BARBARA,
a Political Subdivision of the State of California;
SANTA BARBARA COUNTY BOARD OF SUPERVISORS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

THE COUNTY'S BRIEF EVADES THE CONFLICT BETWEEN THIS COURT'S *INTERNATIONAL COLLEGE OF SURGEONS* CASE AND THE DECISION BELOW

The County of Santa Barbara's refusal to come to grips with the fundamental error below is eloquently displayed in its Brief in Opposition, where it terms *City of Chicago v. International College of Surgeons*, 522 U.S. __, 139 L.Ed.2d 525 (1997) "only tangentially related to the issues posed here." (Br. in Opp., pp. 16-17, n.17.) On the contrary, the disruption in the law accomplished in this case by the Ninth Circuit Court of Appeals is laid bare by that opinion:

> "a facial challenge to an allegedly unconstitutional zoning ordinance is a claim which we would *assuredly not* require to be brought in state courts." (*City of Chicago*, 139 L.Ed.2d at 537 [1997]; quoting with approval; internal punctuation simplified; emphasis added.)

What this Court just held would "assuredly not" be required is precisely what the courts below "assuredly" *did* require.

City of Chicago is thus directly on point to the issues raised here. Indeed, *City of Chicago* foreshadowed this case. Where *City of Chicago* was a removal case, this is a diversity case. Although Justices Ginsburg and Stevens expressed the belief that the analysis would be no different for diversity cases (139 L.Ed.2d at 541-542, 543, 546, 548), the majority was content to leave that question for a day when it was directly presented (139

L.Ed.2d at 540). This is that day. The question reserved in *City of Chicago* is thus squarely at the heart of this case: whether a diversity plaintiff is entitled to the same legal treatment as a removal defendant. It is appropriate to answer that question while *City of Chicago* is still fresh, the country's attention is focused on the issues, and the issues are clearly on the Court's mind.

The remainder of the County's brief does not come any closer to dealing with the issues. It's argument goes off the track at the very outset. In its first attempt to "restate" the questions presented here, the County asserts the "pendency of the same claims in state court . . . ." (Br. in Opp., p. i.) Wrong. As the Court of Appeals noted, the state suit is quite different. (App. A-4.) It raises discrete issues involving the State of California, an entity that, because of the Eleventh Amendment, cannot be sued in federal court.

Moreover, the County fails to deal with the facial justiciability of its clearly stated demand that *any* development Sinclair may wish to make on its property — regardless of size, scope, intensity, or impact on the community — *must* be accompanied by Sinclair's "dedication" of "[a] minimum of 20% of the site," including all of the "dry sandy beach" and the "undeveloped bluff top." (App. E-5.) Such a blanket demand plainly violates *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which require a nexus and a rough proportionality between the development's impact and the "dedication" demanded. With all due respect, the County thus thumbs its nose at *Dolan's* holding that *the County* — not Sinclair — bears the burden of proving both nexus and rough proportionality. Yet the County has not even pretended to meet its burden. The County's position that it can simply demand specific property as a *quid pro quo* for development permission and then place

the burden on Sinclair to show the propriety of some lesser exaction simply defies *Dolan*. This Court's intervention is needed, if nothing else, because its holdings in *Nollan* and *Dolan* are being flouted.

Nor does the County's brief deal with the arbitrary treatment meted out to Sinclair. Treatment like declaring that there are five archeological sites somewhere on the 265-acre property, but refusing to say where (to the owner of the property, no less) for feigned "fear" of spoliation; and then using the unidentified sites as an excuse to preclude development on virtually the entire property. Or treatment like eliminating virtually all access to the property and then precluding development on the ground that the property has no proper access. Regardless of whether such arbitrary treatment rises to the level of a taking of property, it *is* arbitrary and at least raises a justiciable issue of due process and fundamental fairness of treatment. But not in the Ninth Circuit, which decided *en banc* that the constitutionality of such treatment cannot *ever* be litigated — only takings can. (*Armendariz v. Penman*, 75 F.3d 1311 [9th Cir. 1994] [*en banc*].) And even the suggestion of *Armendariz* that takings claims can be litigated there now turns out to be illusory. As the opinion below concedes, the Ninth Circuit "has consistently held that land use planning," as an entire field of law, qualifies for abstention under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). (App. A-14.) That defies *Pullman*, whose rule limits abstention to those few cases where there is an uncertain issue of state law whose resolution in the plaintiff's favor would moot the federal controversy.

This Court's attention is sorely needed to provide property owners in the western third of this country with the same opportunities for access to federal courts as their counterparts elsewhere. In the Ninth Circuit, prop-

erty owners' due process claims are simply not being adjudicated. Period. Thus, in the Ninth Circuit, they have no remedy for arbitrary government treatment; and issues of federal constitutional import are routinely shunted to state courts, in disregard of this Court's repeated admonition that such treatment "is an *extraordinary* and *narrow exception* to the duty" of federal courts to decide cases properly before them. (E.g., *Moses H. Cone Hosp. v. Mercury Constr.*, 460 U.S. 1, 14 [1983].)

Four years ago, this Court declared that courts should no longer treat property owners' rights under the Fifth Amendment as a "poor relation" to other Bill of Rights guarantees. (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1974].) That desideratum has not become reality in the Ninth Circuit. Granting certiorari in this case and reversing for a decision on the merits would help transform the Court's admonition from a ringing phrase into litigational reality.

THE NINTH CIRCUIT'S IDIOSYNCRATIC RULES DEFY ITS DUTY TO ADJUDICATE ISSUES PLACED WITHIN ITS JURISDICTION BY CONGRESS

Having found at least one of Sinclair's federal claims to be ripe, the Ninth Circuit nonetheless refused to consider its merits. Instead, it ordered the District Court to abstain in favor of state court litigation. The error in that holding and its conflict with the law is clear.

First, the ruling below flies in the face of generations of this Court's teachings that it is incumbent on federal courts to decide cases within their jurisdiction:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District

> Court to consider federal constitutional issues can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts . . ." (*England v. Louisiana Medical Examiners*, 375 U.S. 411, 415 [1964].)

Second, it misconstrues the impact of the abstention doctrine on that duty to adjudicate. As this Court has repeatedly held, that duty is a "virtually unflagging obligation [on the courts] to exercise their jurisdiction." (*Deakins v. Monaghan*, 484 U.S. 193, 203 [1988]; *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813 [1976].) Abstention, by contrast, is a "narrow exception" limited to "extraordinary" circumstances. (*Deakins*, 484 U.S. at 203; *Colorado River*, 424 U.S. at 817; *Moses H. Cone*, 460 U.S. at 25.)

For the Ninth Circuit to defy that "unflagging obligation" and "consistently" hold that an entire field of the law — i.e., all cases having anything to do with "land use planning" — *ipso facto* meets the requirements for abstention (App. A-14) cannot be reconciled with this Court's limitation of abstention to "extraordinary" cases. Certainly, there is nothing "extraordinary" about this case. As the Ninth Circuit itself concluded, ". . . the conventional inverse condemnation claim advanced by Sinclair does not appear to be particularly extraordinary or unique, and Sinclair does not raise a novel claim of statutory interpretation." (App. A-15.) Rote application of the abstention doctrine in such circumstances cannot be squared with this Court's jurisprudence and that of other Circuits. Indeed, it defies the core principle of abstention law that reserves for abstention only those

few cases in which state law issues are novel or unsettled. Nothing of the sort is true here.

Third, the County's bland suggestion that Sinclair could return to federal court after litigating in the state court (Br. in Opp., p. 9) is disingenuous. It ignores both reality and Ninth Circuit precedent.

Under the peculiar rules of the Ninth Circuit, if Sinclair were to try the facts of its dispute with the County in state court, *res judicata* would preclude it from returning to federal court. That is precisely what happened in *Dodd v. Hood River County*, __ F.3d __, 1998 WL 57497 (9th Cir. 1998). After litigating issues of state law in state court (see the earlier decision reported as *Dodd v. Hood River County*, 59 F.3d 852 [9th Cir. 1995]), the plaintiffs were told that, because they complied with the requirement of litigating the *common facts* in state court, they would be precluded from proceeding further in federal court with their federal constitutional claims. The County's argument is thus no more than an invitation to pursue the proverbial "Catch-22."

The Ninth Circuit's *Dodd* rule lays to rest the County's assurance that Sinclair could always return to federal court. This is so even though *Dodd* flies in the face of this Court's decision in *England*. There, this Court clearly explained that trial of the facts is critical, and that a state court trial cannot substitute for a federal court trial:

> "Limiting the litigant to review here [on certiorari after the state court trial] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. . . . Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would

> have been by the District Court, a litigant may not be unwillingly deprived of that determination." (*England*, 375 U.S. at 416-417.)

Fourth, the fact that the particular factual attributes of a county land use plan have not been examined by the state courts provides no basis for abstention, contrary to the Ninth Circuit's belief (see App. A-15) and the County's argument (Br. in Opp., p. 13). The *Pullman* abstention doctrine has to do with unsettled issues of state law, not how a state court might or might not choose to apply clear law to a particular factual situation. This Court made that plain in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984), where it reviewed on the merits a novel state statutory scheme that had never been examined by the state courts. There, as here, there was no way to interpret the state laws that would render constitutional adjudication unnecessary. (*Midkiff*, 467 U.S. at 236.)

Finally, contrary to the County's assertions (Br. in Opp., pp. 1, 5-8), *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959) has nothing to do with this case. The reason this Court approved abstention there was because of a clear dispute about unsettled state law, i.e., whether a city had the power to condemn a public utility — clearly an issue of state statutory law, not an application of settled law to the facts of a particular case.

Not so here. The County's demands are not in doubt. Even the Ninth Circuit made clear that it did not think so. It merely wanted to create a rule that no local rule or regulation could be challenged in federal court until it had first been reviewed in state court. (See App. A-15.) If the state-wide Hawaiian land redistribution scheme examined in *Midkiff* did not meet the requirements for abstention in favor of local review, then a county land use plan affecting only 265 acres surely does not.

WHEN GOVERNMENT REGULATORS DEAL ARBITRARILY WITH THE CONSTITUTIONAL RIGHTS OF PROPERTY OWNERS, COURTS SHOULD NOT AVERT THEIR GAZE, BUT PROVIDE RELIEF

The primary reason for this Court to grant certiorari is that the Courts of Appeals are in conflict and disarray on how to deal with arbitrary government regulations affecting property owners. As the decision at bench makes clear, (App. A-9-10), after *Armendariz*, a property owner in the Ninth Circuit has no protection from arbitrary regulation that does not effect a complete wipeout, thus rising to the level of a taking. In the Third Circuit, by contrast, such claims are taken seriously and treated on the merits. (*DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 [3d Cir. 1995] [dismissing takings claims but dealing with substantive due process claims].) The same is true in the D.C. Circuit. (*Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455 [D.C. Cir. 1997].)

But such conflict of decisions aside, it ought to be alarming that the kind of treatment Sinclair suffered could be so insensitively brushed off as beneath contemplation. The issues here are of constitutional import. They are framed against the background of a local government agency that has for years avowedly wanted to own Sinclair's 265-acre oceanfront property. That is a readily provable matter of local notoriety. On its face, the same County plan that restricts Sinclair's use of the property avowedly makes County acquisition a "high" priority item. (Complaint ¶¶ 17-18.) In short, the County's purpose here is not regulatory, but acquisitory. The federal government has been held constitutionally liable for acting in an acquisitory mode, even though using regulations as the means of effecting its purpose.

(*Drakes Bay Land Co. v. United States*, 424 F.2d 574 [Ct. Cl. 1970].)

To buy itself time to find the money, and to ensure that the property remains undeveloped in the interim, the County placed severe and arbitrary restrictions on Sinclair's use of it. (See Pet. for Cert. pp. 5-7.) What else can one call it when the County says, in effect, "We have a list of five archeological sites that require protection. However, we refuse to tell you where they are and, since they could be anyplace, we'll just have to forbid development on virtually your entire property." And then there's the ploy of eliminating the major access routes that would have linked the property to the nearby freeway, and using lack of proper access as a justification for not permitting development. Or the designation of 85% of the parcel as "environmentally sensitive" without any current data to support that conclusion (a conclusion facially suspect given the years of agricultural use of the property, which so changed the character of the land that it cannot be environmentally sensitive — it is farmland, plain and simple). Finally, there is the *Nollan/Dolan* violation of demanding a "donation" of "a minimum of 20% of the site" as the price for approving *any* kind of development at all, irrespective of any required nexus or showing of proportionality as required by this Court. (App. E-5.)

These issues ought to be of substantive concern to anyone with constitutional sensitivities. That they would be seriously considered and reviewed on their merits in the federal courts of the District of Columbia or Pennsylvania, but brushed aside in the states of the Ninth Circuit, is something that creates systemic jurisprudential problems.

Land use regulators are not fools. They read the judiciary's output, and they are advised by competent counsel. Whether they openly acknowledge it or not,

Lord Acton's aphorism holds true: power corrupts. That is why two prominent commentators sympathetic to the regulators' side of these disputes justifiably concluded that the California courts' undue deference to regulators has "elevated governmental arrogance to a fine art." (Babcock & Siemon, The Zoning Game Revisited 253 [1985].) That is why relief from the federal courts is essential. Yet, the Ninth Circuit has now created a system in which the federal courts offer no chance of relief either. Under *Armendariz*, they refuse to acknowledge the possibility of a substantive due process claim. As shown below, they now propose to abstain routinely from takings claims. Should landowners actually embark on such an unwarranted journey through the state courts, the rule of *Dodd* would await their "return" to federal court as their ultimate fate. That does not leave much of the ostensible constitutional protection of private property rights.

CONCLUSION

The de facto second-class citizens who own property in the Ninth Circuit need this Court's intervention. Without it, their constitutional rights are not worth the parchment on which they are written. To vindicate those rights, and to complete the jurisdictional discussion this Court began in *City of Chicago*, Sinclair prays that certiorari be granted.

Respectfully submitted,
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